Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

No. 10-530

IN THE

Supreme Court of the United States

NAWAB MUNIR UL HAQ,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "law of the case" doctrine, while non-statutory, is a well-established legal doctrine with a long-standing foundation in the federal courts. *See Christianson et al. v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). The rule requires that: Once a court finally decides any issue of law, the law of the case holds that the ruling should be adhered to by a transferor court. The question presented is:

Whether the Fifth Circuit erred in narrowly construing the scope of its jurisdiction to review motions to reopen determinations of the Board of Immigration Appeals under 8 U.S.C. §§ 1252(a)(2)(B)(ii) and (a)(2)(D) by refusing to consider arguments that the agency applied an incorrect legal standard and thus failed to follow the "law of the case," in direct conflict with the construction of those statutes by numerous other circuits.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nawab Munir Ul Haq respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Petitioner is the petitioner/appellant below. Respondents are the United States Attorney General, Secretary of the Department of Homeland Security, and Director, United States Immigration and Citizenship Services.

OPINIONS BELOW

The opinion of the court of appeals is unreported. The decision of the Board of Immigration Appeals denying Petitioner's Motion to Reopen and Reconsider, and the decision of the Board of Immigration Appeals denying petitioner's motion for reconsideration, is also unreported. (See Appendices A-C)

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for Writ of Certiorari is being filed within ninety days of the above-referenced decision of the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

As part of its amendments to the Immigration and Nationality Act (INA) in 1996, Congress codified an alien's right to file a motion to reopen removal proceedings.

8 U.S.C. § 1229a(c)(7). This Court, in *Dada v.*

Mukasey, 128 S.Ct. 2307 (2008), resolved the important question of an alien's right to file a motion to reopen removal proceedings, notwithstanding certain statutory and regulatory bars. This Court also recently resolved the issue of whether a prison guard could be granted asylum, even though he may have "persecuted" others, by being a guard in *Negusie v. Holder*, 129 S.Ct. 1159 (2009). This Court answered in the affirmative, holding that the pertainent section of INA §101(a)(42) was "ambiguous."

This mater before the Court has a protracted procedural history. Petitioner, a native and citizen of Pakistan, initially entered the United States in 1994 with a non-immigrant visitor's visa. In 1997, an immigration judge residing within the jurisdiction of the Sixth Circuit Court of Appeals denied the petitioner's application for asylum and withholding of deportation and as a matter of discretion denied voluntary departure based on her finding that he was a "persecutor.[1]" During the pendency of his Board of Immigration Appeals ("BIA")

1. Under the INA, in order for an alien to be eligible for asylum, the alien must meet the definition of a refugee-§101(a)(42). The INA defines a refugee as a person who is "unable or unwilling to return to ... [a] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." he definition of "refugee" explicitly excludes "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." This exclusion, commonly referred to as the "**persecutor bar**," gives the Secretary of Homeland Security authority to deny certain forms of relief, such as asylum and withholding of removal, to any alien who has engaged in the enumerated conduct. The persecutor bar *does not apply to applicants for adjustment of status under INA § 245*, however. The record reflects that petitioner in fact was an applicant for adjustment of status.

appeal and before a final decision was made, petitioner married a United States citizen and filed an I-130 alien-relative visa petition and the petition later is approved by the Department of Homeland Security's Citizenship and Immigration Services. The BIA never ruled on his appeal, however, because petitioner withdrew it in February 2002. The record then was remanded back to the immigration judge sitting within the jurisdiction of the Sixth Circuit.

Later that year, on June 10, 2002, the BIA nevertheless exercised jurisdiction, citing "extenuating circumstances" and granted the petitioner's motion to reopen, inexplicably filed with the BIA by petitioner's then-counsel, and despite the record already being sent back to the immigration judge well before the motion with the BIA had been filed. Subsequently, the BIA "remanded" the matter back to the immigration judge for "further proceedings."

In the *interim*, the petitioner moved south to Louisiana and jurisdiction moved with him. On November 19, 2004, a different immigration judge, now presiding over the petitioner's case within the Fifth Circuit, ruled that the BIA's remand "without limit or restriction, could be viewed as a remand for consideration of the respondent's case *in toto*." But because the BIA didn't address the asylum, withholding and voluntary departure requests, the immigration judge found the remand only **"to be for the purpose of addressing developments in the respondent's [petitioner's] case that arose subsequent to the previous immigration judge's rulings"** [emphasis added] and only addressed the request for the

petitioner's adjustment of status application. The immigration judge also denied the petitioner's request for adjustment of status, ordering him removed from the United States because "the [previous] Immigration Judge [residing in the Sixth Circuit] found him to be a "persecutor." Petitioner appealed the decision to the BIA. On August 10. 2006, the BIA affirmed the second immigration judge's order, averring that the immigration judge sitting in the Fifth Circuit properly denied the respondent the opportunity to contest that issue [whether petitioner ever was a "persecutor"] on remand."

Nearly three years later, the petitioner filed a motion to reopen with the BIA which was denied on March 27, 2009. Petitioner filed a timely petition for review of that decision with the Fifth Circuit Court of Appeals, and also filed a timely motion for reconsideration with the BIA. The BIA denied petitioner's motion for reconsideration on April 22, 2009, and the matter was consolidated with the pending Fifth Circuit Court of Appeals case. On July 20, 2010 the Fifth Circuit Court of Appeals denied in part and dismissed in part both petitions for review. Relying solely on the *sua sponte* jurisdiction issue argued in the case and none other, the Fifth Circuit Court invoked jurisdictional bars to dismiss *all issues* cited by the petitioner. While petitioner's argument concerning the BIA's failure to rule on his reconsideration request now was moot, the Fifth Circuit Court did not address the argument by petitioner that the BIA itself failed to address arguments made in the 2009 motion to reopen, namely which law to apply in petitioner's removal hearing. Petitioner's removal proceedings clearly encompassed two different federal

circuit jurisdictions (Sixth, Fifth circuits respectively) and each jurisdiction had conflicting precedents concerning the definition of "persecutor" under the INA[2]. The Fifth Circuit court also was silent on the 2009 BIA opinion and order, in which that agency, for the first time, retroactively revealed why it remanded the matter to the immigration judge back in 2002, stating:

> We point out that the respondent's [petitioner's] motion to reopen and remand sought only an opportunity to apply for adjustment of status and did not request or argue a basis to reinstate the withdrawn appeal from the denial of his asylum application. Thus, he gave up his opportunity to have the immigration judge's 1997 finding that he is a persecutor reviewed by this Board. Of course, our 2002 decision

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2. Petitioner asserted also that the Fifth Circuit Court of Appeals has held that the BIA's failure to follow its own precedents without providing a reasoned explanation for doing so can constitute an abuse of discretion, citing *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 802-03 (5th Cir. 2007), *Billeke-Tolosa v.Ashcroft*, 385 F.3d 708, 712 (6th Cir. 2004) ("[T]he BIA ha[s] no discretion to ignore its own precedent."), *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir.2003) ("A nonprecedential decision by the BIA in defiance of its own precedential case law simply cannot be classified as discretionary"), *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (the BIA must provide a reasoned basis for departing from past precedent) and *Merchant v. Atty. General*, 461 F.3d 1375 (11th Cir. 2006 n.). "[A] mistake of law is, by definition, an abuse of discretion." *United States v. Hoffer*, 129 F.3d 1196, 1200 (11th Cir. 1997). Petitioner also argued to the Fifth Circuit that this included the BIA's refusal to reopen and or reconsider other cases under identical circumstances.

> remanding his case to the immigration judge was futile because the immigration judge was bound by a final finding that he persecuted others and ultimately determined that this finding warranted the denial of his adjustment of status application on discretionary grounds.
>
> *BIA decision, p. 2, December 4, 2009.*

The BIA also found that the motion filed by the petitioner years later was not a motion to reopen but a motion to reconsider, even though motions to reconsider are permitted only 30 days after a final decision and petitioner's 2002 motion was entilted a "motion to reopen." Petitioner, moreover, specifically stated that he was moving to "reopen proceedings" and cited the legal basis for reopening to the BIA in 2009. The petitioner also cited cases which were currently under consideration by this Court such *Kucana v. Holder*, 130 S.Ct. 827 (2010), but were not decided at the time petitioner submitted his brief[3]. Petitioner also discussed another decision by this Court, *Negusie v. Holder*, 129

3. In *Kucana*, this Court remanded proceedings to the Seventh Circuit Court of Appeals for decision on the merits after holding that 8 U.S.C. § 1252(a)(2)(B) does not affect judicial review of situations in which immigration officials' discretion is specified by regulation rather than statute., *Kucana v. Holder*, 130 S.Ct. 827 (2010). This Court reversed the Seventh Circuit Court, which held that a decision by the Board of Immigration Appeals, declining to reopen a removal proceeding may be reviewed only to determine whether the Board misunderstood a regulation, a statute, or the Constitution. 8 U.S.C. § 1252(a)(2)(D). This Court concluded the opposite, that a court of appeals also may set aside a decision in which the Board has abused its discretion in applying the law to the facts.

S.Ct. 1159 (2009), which vacated the Fifth Circuit's previous decision and held the BIA wrongly deemed its interpretation of the persecutor bar to be mandated by *Fedorenko v. United States*, 449 U.S. 490 (1981), and that the Fifth Circuit Court misapplied that opinion. Instead, the Fifth Circuit court, invoking jurisdictional reasons, refused to address the implications of the BIA's previous decision to reopen proceedings for adjustment of status in a jurisdiction which would have not resulted in the "persecutor bar."

Inexplicably, the Fifth Circuit court permitted the final order of a subsequent decision of a different immigration judge residing in the Sixth Circuit jurisdiction. Specifically, the Fifth Circuit let stand a finding that petitioner was a "persector" pre-*Negusie*, rendering its decision *after* this Court's decision in *Negusie v. Holder*, 129 S.Ct. 1159 (2009). As a result of the decision of the Fifth Circuit on July 20, 2010, the order of removal became final and petitioner was forever barred from adjusting his status to that of a lawful permanent resident, despite being the beneficiary of an approved (I-130) visa petition based on his marriage to a United States citizen. Petitioner has never been convicted of any crime inside or outside the United States.

I.

ARGUMENT

THE FIFTH CIRCUIT DISREGARDED THE LAW OF THE CASE DOCTRINE IN IMMIGRATION PROCEEDINGS

The Law of the case, a legal term of art that is applicable in common law, recognizes the related doctrine of *stare decisis*. The Law of the case refers to instances where "rulings made by a trial court and not challenged on appeal become the law of the case." *Hughes v. State*, 490 A.2d 1034, 1048 (Del.1985) (*citing Haveg Corp. v. Guyer, Del.Supr.*, 211 A.2d 910, 912 (1965)). "Unless the trial court's rulings were clearly in error or there has been an important change in circumstances, the Court's prior rulings must stand." *Id. citing United States v. Estrada-Lucas*, 651 F.2d 1261, 1263 (9th Cir.1980); *Smith v. United States*, D.C.App., 406 A.2d 1262 (1979). The Law of the case also designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. *See Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303. The doctrine provides that an appellate court's determination on a legal issue is binding on both the trial court on remand and an appellate court on a subsequent appeal given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607 (1980).

Board of Immigration Appeals. It included the BIA's order remanding it back to the immigration court. As held by the Ninth Circuit in *Wyler Summit Partnership v. Turner Broadcasting System*, Inc., 235 F.3d 1184 (9th Cir. 2000), "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case...." "For the doctrine...to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition." The Sixth Circuit Court of Appeals has recently decided the issue of whether a factual determination made to determine one issue in a case also decides another claim in the same matter that has not otherwise been fully litigated. That Court held it could not, and that the "law of the case" doctrine limits relitigation of an issue once it has been decided in an earlier stage of the same litigation in order to "promote finality, consistency, and judicial economy." Here, the petitioner never had an opportunity for a full and fair opportunity to litigate the "persecutor" issue, the immigration judge simply denied the his application for relief, ordering him removed from the United States after the BIA remand, simply because of the IJ's previous order. Petitioner was then doomed by the then-governing law concerning persecutors, before this Court changed that in *Negusie v. Holder*[4]. The subsequent motions to reopen all directly addressed

4. One may argue that the law is still unresolved in the Fifth Circuit, given that court's decision in this case and also because it articulated no opinion in *Negusie v. Holder*, other than vacating its earlier decision in light of this Court opinion on April 13, 2009 inexplicably determining that "that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4," *See*, summary calendar decision, 06-60193, April 13, 2009.

that issue as well, but were denied later by the BIA in subsequent appeals. See petitioner's appendix at B-C. The Fifth Circuit did not apply the law of the case doctrine as it is followed in virtually every other circuit in the United States, as the doctrine has been held to apply to implicit holdings, i.e., conclusions that are logically necessary implications of positions articulated by the court, as well as explicit ones. This matter involved a BIA decision which reopened proceedings and remanded the matter back to the immigration judge. Then after a change of venue, and a removal order was entered based on a finding that the petitioner was statutorily barred (because of a previous finding by yet another immigration judge that he was a "persecutor"[5]), the implicit holding of the BIA entered previously was

5. The language of the persecutor bar has its origins in the Displaced Persons Act of 1948 ("DPA"). The DPA was enacted in an effort to facilitate European immigration after World War II. In defining the scope of those eligible for relief, the DPA restricted its benefits to those aliens who met the definition of a displaced person under the International Refugee Organization's Constitution ("IRO Constitution"). In turn, the IRO Constitution explicitly excluded individuals who "voluntarily assisted the enemy forces since the outbreak of the [S]econd [W]orld [W]ar in their operations against the United Nations." A 1950 amendment to the DPA moved the exclusion under the IRO Constitution into the text of the DPA itself and further refined its language to exclude persons who "advocated or assisted in the persecution of any person because of race, religion, or national origin." The Holtzman Amendment of 1978 expanded the application of the persecutor exclusion beyond the visa program under the DPA to all individuals seeking admission to the United States who engaged in Nazi acts. However, it was not until 1980 that the United States enacted comprehensive legislation to deal with refugees, which included a broad bar to asylum for any immigrant who engaged in persecution. The legislative history of the persecutor bar is

(Cont'd)

not followed and the Fifth Circuit dismissed subsequent requests to review the order of the BIA in a motion to reopen invoking the cloak of jurisdictional bars when in fact it had jurisdiction to hear these issues pursuant to another case decided by this Court from the Fifth Circuit, *Dada v. Mukasey*. 128 S.Ct. 2307 (2008)[6]. This Court, in *INS v. St. Cyr*, 533 U.S. 289, 320, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) also recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (*quoting INS v. Gardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).

The national importance of uniform law applied in the context of federal immigration proceedings cannot be understated. The petitioner's life changed forever because while convicted of no crime, he moved from one state to another (from the Sixth Circuit jurisdiction to that of the Fifth Circuit). Petitioner's subsequent

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(Cont'd)

significant because the term "persecution" is not defined in the INA. The ambiguity of the term stemmed in part from Congress's (mistaken) belief at the time the Refugee Act of 1980 was adopted that the term persecution had already been defined. As a result, cases interpreting persecution under the DPA, most significantly *Fedorenko v. United States*, 449 U.S. 490 (1981) have historically exerted substantial influence over the interpretation of the term under the INA by immigration judges, the Board of Immigration Appeals, and federal courts.

6. This Court in *Dada* averring that "[r]esolution of the questions presented turns on the interaction of two statutory schemes — the statutory right to file a motion to reopen in removal proceedings; and the rules governing voluntary departure." *Id.* at 2312.

immigration judge (physically sitting in yet another jurisdiction), while bound by the law of the Fifth Circuit, refused to follow the BIA order years before from another jurisdiction. The IJ applied the "presecutor" finding of the previous immigration judge before the matter was reopened on all accounts by the BIA. He then invoked the Fifth Circuit's jurisdictional case law to petitioner's case, which meant the death-knell to his chances of relief from removal proceedings, all done pre-*Negusie*. Given the Fifth Circuit's then-precedent concerning the persecutor bar to adjustment of status, petitioner was in a "Catch-22" which, because of the Fifth Circuit's failure to articulate an opinion in *Negusie*, may still be unresolved. Clearly, there were many critical issues, other than jurisdiction, before the Fifth Circuit in this case. Thousands of other similarly situated people in removal proceedings, like petitioner, have been and will be affected because this issue has not been resolved. As this Court recently reiterated profoundly in *Padilla v. Kentucky* 559 U.S. ___, 130 S. Ct. 1473 (2010):

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.

The decision in *Ul Haq* will cause inconsistent judicial rulings amongst immigration judges residing in the

Fifth Circuit and immigration proceedings nationwide. Only review by this Court can exact uniformity to the application of the Law of the case doctrine in immigration removal proceedings. This writ should be granted for a consideration of these issues now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT FILED JULY 20, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60267

Summary Calendar.

NAWAB MUNIR UL HAQ,

Petitioner

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent

Petitions for Review of Orders of the
Board of Immigration Appeals
BIA No. A073 419 249

Filed: July 20, 2010

Lyle W. Cayce
Clerk

Before KING, STEWART, and HAYNES, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

Nawab Munir-Ul Haq ("Haq"), a citizen and native of Pakistan, petitions this court for review of the Board of Immigration Appeals' (BIA) order denying his motion to reconsider or reopen his removal proceedings (the "first motion") and the BIA's order denying his motion to reconsider the denial of the first motion (the "second motion"). The BIA found that Haq's first motion was untimely and numerically barred and, therefore, denied it. In denying Haq's first motion, the BIA also stated that it would not reopen Haq's removal proceedings *sua sponte*. The BIA denied Haq's second motion based upon its determination that its original ruling was correct and its determination that *sua sponte* reopening was not appropriate.

Haq argues that the BIA erred by denying his first motion. Although Haq argues that the BIA erred, he raises no challenge in his brief to the BIA's determination that his first motion was untimely and numerically barred. Accordingly, we find that he has abandoned any such challenge. *See Soadjede v. Ashcroft*, 324 F.3d 830, 833 (5th Cir. 2003).

Despite the fact that his first motion was untimely and numerically barred, Haq argues that the BIA should have granted his first motion by using its *sua sponte* authority to reopen his removal proceedings. As Haq concedes, we do not have jurisdiction to review the BIA's refusal to reopen his proceedings *sua sponte*.[1] *See*

1. Although Haq concedes our lack of jurisdiction, he nevertheless argues that we may review the BIA's reasons for refusing to exercise its *sua sponte* authority, citing *Cruz v. Att'y*

(Cont'd)

Enriquez-Alvarado v. Ashcroft, 371 F.3d 246, 249-50 (5th Cir. 2004). Accordingly, his petition for review on this basis must be dismissed.

With respect to the second motion, Haq only argues that the court should remand this case and order the BIA to rule on the second motion. As the BIA has already issued a ruling on that motion, Haq's argument is moot. Haq has not raised any other challenge to the BIA's denial of the second motion. Accordingly, Haq has abandoned any such challenge. *See Soadjede*, 324 F.3d at 833.

PETITIONS FOR REVIEW DENIED in part and DISMISSED in part.

(Cont'd)

Gen., 452 F.3d 240, 250 (3d Cir. 2006) (questioning whether the BIA could, without explanation or reason, depart from an allegedly settled practice of reopening proceedings when an alien could demonstrate that his "conviction was vacated under" *In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003)). Haq's case is distinguishable from *Cruz*. Haq alleges that he is not subject to deportation because he is entitled to an adjustment of status. Haq does not allege that his deportation order is invalid in light of a vacated conviction, and Haq has not shown that the BIA has a settled practice of reopening proceedings that challenge adjustment of status decisions. Acccordingly, we need not decide whether to adopt the reasoning of *Cruz* because, in any event, its holding is inapplicable to this case. *See Vaso v. Att'y Gen.*, 264 F. App'x 161, 162 n.1 (3d Cir. 2009) (unpublished) (distinguishing *Cruz* on a similar basis).

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW FALLS CHURCH, VIRGINIA 22041 DATED DECEMBER 4, 2009

File: A073 419 249 – New Orleans, LA

In re: NAWAB MUNIR-UL HAQ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Christopher W. Helt, Esquire

ON BEHALF OF DHS: Charlotte Marquez
Assistant Chief Counsel

APPLICATION: Reconsideration

The respondent has filed a timely motion to reconsider our last decision dated March 27, 2009, which denied a motion that was filed with the Board of January 21, 2009. Despite its caption as a motion to reopen, we determined that the January 2009 motion was substantively a motion to reconsider and was time barred, since it was filed 2 years after the last decision in the case in January 2007. 8 C.F.R. § 1003.2(b). Alternatively, if considered a motion to reopen, we determined that it was both time and number barred.

8 C.F.R. § 1003.2(c). The January 2009 motion did not argue that an exception applied and we found that sua sponte reopening was not warranted.

The regulations provide that motions to reconsider shall be limited to one motion to reconsider in any case previously the subject of a final decision by the Board. *See* 8 C.F.R. § 1003.2(b)(2). We find no error in treating the respondent's January 2009 motion as a motion to reconsider and it is therefore barred by numerical limitations. To the extent the motion is challenging that aspect of our last decision alternatively denying the prior motion if deemed a motion to reopen, we are not persuaded that we erred in finding it time-barred. We point out that the respondent has not argued a basis to equitably toll any portion of the 2-year period between our January 2007 decision and the filing of the January 2009 motion.

Further, our authority to reopen sua sponte is sparingly invoked, and only under extraordinary circumstances. We considered the respondent's arguments that this is such a case and rejected them. With respect to the respondent's renewal of jurisdictional challenges to our 2002 decision granting remand of his case to the Immigration Judge to permit him an opportunity to pursue an application for adjustment of status, we considered that adjustment motion – which was unopposed and omitted any reference to the persecutor bar basis for his asylum denial – as a favorable exercise of our discretion. 8 C.F.R. § 1003.1(a) (the Board may reopen on its own motion any case in which it has

rendered a decision). As a result, the respondent was given the opportunity he requested to apply for adjustment of status before an Immigration Judge. We point out that the respondent's 2002 motion to reopen and remand sought only an opportunity to apply for adjustment of status and did not request or argue a basis to reinstate the withdrawn appeal from the denial of his asylum application. Thus, he gave up his opportunity to have the Immigration Judge's 1997 finding that he is a persecutor reviewed by the Board. Of course, our 2002 decision remanding his case to the Immigration Judge proved to be futile because the Immigration Judge was bound by a final finding that he persecuted others and ultimately determined that this finding warranted the denial of his adjustment of status application on *discretionary* grounds. We are not persuaded that we should now exercise our limited discretion to reopen his case sua sponte for purposes of re-litigating the issue.[1] *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (the rules governing motions are intended to bring finality to proceedings and the Board's *sua sponte* authority is not meant to be used as a cure for filing defects or to otherwise circumvent the regulations where enforcing them might cause hardship). Accordingly, the motion will be denied.

ORDER: The motion is denied.

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1. We point out that if we had declined to consider his 2002 motion on jurisdictional grounds as the respondent argues should have happened, he would have been required to file an untimely motion directly with the Immigration Judge. If the motion had been considered by the Immigration Judge on the

(Cont'd)

Appendix B

(Cont'd)

merits despite its untimeliness, the respondent offers no reason why the Immigration Judge would have reached a different conclusion regarding his eligibility for adjustment than the discretionary determination he made when the issued came before him on remand from the Board. We further note that the respondent does not specifically request further consideration of his asylum application, but is rather seeking further opportunity to apply for the purely discretionary relief of adjustment of status. *See generally Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004) (finding that due process rights do not attach to the pursuit of purely discretionary relief).

APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW FALLS CHURCH, VIRGINIA 22041 DATED MARCH 27, 2009

File: A073 419 249 – New Orleans, LA

In re: NAWAB MUNIR-UL HAQ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Christopher W. Helt, Esquire

ON BEHALF OF DHS: Charlotte S. Marquez
Assistant Chief Counsel

APPLICATION: Reconsideration and reopening.

ORDER:

The respondent, a native and citizen of Pakistan, has filed a motion pursuant to 8 C.F.R. § 1003.2. The motion is styled a motion to reopen. However, as the motion does not proffer additional facts or evidence, and is entirely based on arguments that the Board made errors of fact and law in our prior decisions, the motion will be considere as a motion to reconsider and reopen. The procedural history in this matter is lengthy and will

not be repeated here other than to note that our most recent decision in this matter was issued on January 19, 2007, when we denied a prior motion to reopen as untimely. Insofar as the motion seeks reconsideration, motions to reconsider are limited to one motion that must be filed within 30 days. 8 C.F.R. § 1003.2(b). This motion was not filed until January 21, 2009. Therefore, the motion to reconsider time barred. Insofar as the motion requests reopening, these are also limited to one motion, and must be filed within 90 days, with certain exceptions not pertinent here. 8 C.F.R. § 1003.2(c). Therefore, the motion is both number and time barred as a motion to reopen. Finally, the respondents have not demonstrated an exceptional situation that would warrant the exercise of our discretionary authority to reconsider our previous decision or reopen this case *sua sponte*. 8 C.F.R. § 1003.2(a); *see Matter of J-J-*, 21 I&N Dec. 976 (BIA 1977) ("the power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Accordingly, the motion is denied.